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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FIGUEROA TOWER I, LP et al., Plaintiffs and Appellants, v. U.S. BANK NATIONAL ASSOCIATION, as Trustee, etc., Defendant and Respondent.	B287457 (Los Angeles County Super. Ct. No. BC506014)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Krane & Smith, Marc Smith, Ralph C. Loeb and Daniel L. Reback; Greines, Martin, Stein & Richland, Marc J. Poster, for Plaintiffs and Appellants.

Jeffer Mangels Butler & Mitchell, Robert B. Kaplan and Neil C. Erickson, for Defendant and Respondent.

This is a commercial foreclosure case involving a promissory note secured by real and personal property. Plaintiffs and appellants Figueroa Tower I, LP, Figueroa Tower II, LP, and Figueroa Tower III, LP (collectively, Figueroa Tower or plaintiffs) obtained a loan and executed a deed of trust and security agreement. Defendant and respondent U.S. Bank National Association (U.S. Bank) became the holder of the promissory note and security instruments and later foreclosed on the real and personal property pledged as collateral. Plaintiffs sued U.S. Bank and Witkin & Eisinger, LLC, the foreclosure trustee, (collectively, defendants) alleging wrongful foreclosure and other causes of action against both defendants, and breach of contract solely against U.S. Bank. The trial court granted summary adjudication for defendants on all but the breach of contract cause of action, and on that claim, it held two bifurcated-issue bench trials and found in U.S. Bank's favor. We are asked to decide whether the trial court correctly concluded plaintiffs could not prove the heart of their foreclosure-based claims—that they were prejudiced by the inclusion of a $14 million prepayment fee in the foreclosure notice of sale—and had no standing to pursue their breach of contract claim.

I. BACKGROUND

This case has a long and fairly convoluted procedural history. We summarize below only those facts which are pertinent to resolving this appeal, drawing in places on this court's opinion in a prior appeal involving these same parties. (*Figueroa Tower I, LP v. United States Bank Nat. Assn.* (June 16, 2015, B255844 [nonpub. opn.] (*Figueroa Tower I*).)

A. Origin of the Loan and Relevant Provisions

In 2006, plaintiffs executed a promissory note (Note) in favor of German American Capital Corporation in the principal sum of $62 million.[1] The Note's maturity date was August 1, 2016.

To secure repayment of this debt, plaintiffs executed a "Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing" (Deed of Trust) with respect to the real property commonly known as 654 and 660 South Figueroa Street, Los Angeles, California (Property) and with respect to certain personal property. Ultimately, through various assignments and a merger with another bank, U.S. Bank became the holder of the various loan documents.

1. Provisions relating to the prepayment fee

Section 3 of the Note is the provision that concerns the prepayment fee at issue in this appeal. Section 3(a) prohibits prepayment of the Note in whole or in part except in limited circumstances not at issue here. Section 3(b) provides, in relevant part, that "if for any reason the indebtedness evidenced by this Note ('Debt') is prepaid at any time . . . including without limitation any prepayment which occurs after such indebtedness shall have been declared due and payable by [the lender] pursuant to the terms of this Note or the provisions of any other Loan Document due to a default by [Figueroa Tower], then there shall also then be immediately due and payable, a prepayment fee equal to the premium described in Section 12.4(c) of the

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[1] The 2006 loan was a refinance of a loan plaintiffs obtained in 2004.

Security Instrument, without regard to any prepayment prohibition." Section 3(b) further states "[Figueroa Tower] hereby expressly . . . agrees that if a prepayment of any or all of this Note is made, following any acceleration of the maturity of this Note by the holder hereof on account of any transfer or disposition as prohibited or restricted by the Security Instrument, then [Figueroa Tower] shall be obligated to pay, concurrently therewith, as a prepayment fee, the applicable sum specified in the Security Instrument."[2]

The section of the Deed of Trust cross-referenced in the Note's Section 3(b), i.e., Section 12.4(c), defines the "prepayment fee" as "an amount equal to the greater of (A) five percent (5%) of the then outstanding principal balance of the Note on the date of acceleration (the 'Tender Date'), and (B) the Yield Maintenance Amount . . . ." Section 12.4(d) of the Deed of Trust sets forth a formula by which the "Yield Maintenance Amount" is calculated; in broad strokes, it requires calculation of the present value of the remaining scheduled payments of principal and interest due from the "Tender Date" (defined as "the date of acceleration") through the Note's maturity date.

Deed of Trust Section 15.1, which addresses the "Remedies Available," provides that if an "Event of Default under this Deed of Trust" occurs, the Beneficiary is entitled to exercise the right to "[a]ccelerate the maturity date of the Note and declare any or all of the Debt to be immediately due and payable . . . ." Further, "[u]pon any such acceleration, payment of such accelerated amount shall constitute a prepayment of the principal balance of

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[2] A Figueroa Tower representative initialed the Note beneath Section 3 to indicate assent to its terms.

the Note and any applicable prepayment fee provided for in the Note shall then be immediately due and payable."

Deed of Trust Section 16.14 provides in pertinent part that where there is an inconsistency between the Deed of Trust and Note, the terms of the Note control.

2. Additional security provisions, including "General Intangibles"

The Agreements section of the Deed of Trust provides that "in consideration of the Debt . . . [Figueroa Tower] hereby irrevocably mortgages, grants, bargains, sells, conveys, transfers, pledges, acts over and assigns to Beneficiary and Trustee, WITH POWER OF SALE, and creates a security interest in, all of . . . the following described property, whether now owned or hereafter acquired by [Figueroa Tower]," including "[a]ll present and future funds, accounts, instruments, accounts receivable, documents, claims, general intangibles (including, without limitation, trademarks, trade names, service marks and symbols now or hereafter used in connection with any part of the Premises or the Improvements, all names by which the Premises or the Improvements may be operated or known, all rights to carry on business under such names, and all rights, interest and privileges which [Figueroa Tower] has or may have as developer or declarant under any covenants, restrictions or declarations now or hereafter relating to the Premises or the Improvements) (collectively, the 'General Intangibles') . . . ."

Section 13.1 of the Deed of Trust states that the "Deed of Trust is also intended to encumber and create a security interest in, and [Figueroa Tower] hereby grants to Beneficiary a security interest in, . . . all . . . general intangibles and other personal

property included within the Trust Property . . . (said property is hereinafter referred to collectively as the 'Collateral'), whether or not the same shall be attached to the Premises or the Improvements in any manner." Section 13.2 provides "[t]his Deed of Trust constitutes a security agreement between Grantor and Beneficiary with respect to the Collateral in which Beneficiary is granted a security interest hereunder, and, cumulative of all other rights and remedies of Beneficiary hereunder, Beneficiary shall have all of the rights and remedies of a secured party under any applicable Uniform Commercial Code."

B. Bankruptcy Proceedings and Foreclosure

On June 24, 2011, defendants' counsel sent plaintiffs a letter contending plaintiffs had defaulted under the Loan Documents by failing to make required payments. The letter informed plaintiffs that U.S. Bank was accelerating the debt owed under the Note and declaring it immediately due and payable.

After receiving this acceleration letter, plaintiffs filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Central District of California. U.S. Bank obtained an order modifying the automatic stay in the bankruptcy cases and then recorded a Notice of Default and Election to Sell Under Deed of Trust. The Notice of Default stated the amount due and necessary to reinstate the loan as of May 8, 2012, was $6,547,954.46.

Over three months later, U.S. Bank recorded a Notice of Trustee's Sale Under Deed of Trust. The Notice of Sale stated

plaintiffs owed U.S. Bank $81,931,461.72, including default interest, late charges, and most significantly for our purposes, a prepayment fee of $14,007,811.30.

The trustee's sale went forward on January 24, 2013, and U.S. Bank was the sole bidder—purchasing the Property pursuant to a credit bid of $67 million. The Trustee's Deed on Sale stated the amount of the unpaid debt on the day of the sale was $85,529,080.26. The Chapter 11 bankruptcy case was dismissed in May 2013.

Later in November 2013, U.S. Bank served plaintiffs with a notification of disposition of collateral. The notice stated the bank would auction "[a]ll interests of any Debtor in any of the intangible and tangible personal property described on Exhibit B." Among such property listed on Exhibit B were "[a]ll funds, accounts, instruments, accounts receivable, documents, claims, and general intangibles (including (i) all payment intangibles; (ii) all trademarks, trade names, service marks, and symbols now or heretofore used in connection with any part of the Real Property; (iii) all names under or by which the Real Property may be or have been operated or known; (iv) all rights to carry on business under any of those names; and (v) all rights, interests, and privileges that any Debtor has or may have had as a developer or declarant under any covenants, restrictions, or declarations now or heretofore relating to the Real Property)." Exhibit B also contained a footnote which stated, in pertinent part, that "[a]ll uncapitalized terms used in this Exhibit B not defined elsewhere in this Notification have the meanings given those terms in Division 9 of the Uniform Commercial Code of the State of California."

The noticed collateral sale went forward in December 2013. U.S. Bank purchased the property described in the notice through a credit bid, this time in the amount of $10,000. No other bidders appeared at the sale.

In May 2014, U.S. Bank sold the Property to a third party for $80 million.

C. This Action

1. Initial proceedings

Plaintiffs filed their original complaint against defendants in April 2013, alleging seven causes of action including breach of contract, wrongful foreclosure, declaratory relief, conversion, unjust enrichment, accounting, and unfair competition. They filed their first amended complaint alleging the same causes of action later that same year. Defendants answered the first amended complaint and asserted affirmative defenses, including a defense that plaintiffs lacked standing to prosecute the causes of action in their lawsuit.

The trial court sustained defendants' demurrer to the wrongful foreclosure and declaratory relief causes of action in the first amended complaint "'without leave to amend unless [plaintiffs] deposit[ ] 5 million dollars into an escrow account by the close of business on December 10, 2013.'" The trial court also granted a separate motion for summary judgment filed by defendants, ruling plaintiffs had not demonstrated there were issues of fact requiring a trial on whether defendants incorrectly calculated and imposed the $14 million prepayment fee. Defendants appealed the demurrer and summary judgment rulings.

2. Yashouafar *and* Figueroa Tower I

Before this court decided the appeal of those rulings, it decided *U.S. Bank National Assn. v. Yashouafar* (2014) 232 Cal.App.4th 639 (*Yashouafar*), a related case involving a dispute over the same Note and Deed of Trust at issue here. This court's opinion in *Yashouafar*, which involved an action brought by U.S. Bank against the guarantors of the Note, addressed the calculation of the prepayment fee under the Note and Deed of Trust. (*Id.* at p. 641.)

The *Yashouafar* court examined section 3(b) of the Note and relevant provisions of the Deed of Trust, including section 12.4(c), and concluded section 3(b) of the Note and section 12.4(c) of the Deed of Trust conflicted. (*Yashouafar*, *supra*, 232 Cal.App.4th at p. 647 ["Section 3(b) of the Note, which states that a prepayment fee is due after the Note's indebtedness has been prepaid, is inconsistent with section 12.4(c) of the Deed of Trust . . . , which states that the prepayment fee is due if [U.S. Bank] declares the Note's indebtedness due and payable"].) Because section 16.14 of the Deed of Trust states the Note controls in the event of an inconsistency between it and the Deed of Trust, the *Yashouafar* court concluded "no prepayment penalty was due until [the guarantors] prepaid the Note's indebtedness and any prepayment fee should not be calculated based on the June 24, 2011, letter from plaintiff's counsel accelerating payment of the Note's indebtedness." (*Ibid.*) Illuminating the sense in which it used the term "calculated," the *Yashouafar* court explained "that under the clear and explicit terms of the Note and Deed of Trust at issue in this case, no prepayment fee was due until [the guarantors] actually prepaid the Note's indebtedness." (*Id.* at p. 648.)

Following this court's holding in *Yashouafar*, we decided the appeal of the trial court's demurrer and summary judgment rulings in *Figueroa Tower I* and reversed both the trial court's summary judgment and demurrer rulings. As to the demurrer, we concluded plaintiffs had sufficiently alleged an ability to tender the amount defendants contended was due under the Note and Deed of Trust. More significant for our purposes, we concluded our holding in *Yashouafar* compelled reversal of the trial court's summary adjudication of plaintiffs' breach of contract, wrongful foreclosure, and declaratory relief causes of action because "the trial court erred in ruling that the prepayment fee was to be calculated as of [U.S. Bank's] June 24, 2011, acceleration of the indebtedness and not the actual prepayment of the indebtedness . . . ." We remanded the matter to the trial court "for further proceedings."

D. Proceedings After Remand

1. The third amended complaint

Plaintiffs filed a third amended complaint (the operative complaint) in August 2016. The operative complaint asserted four causes of action: (1) breach of written contract; (2) wrongful foreclosure; (3) unjust enrichment; and (4) unfair business practices under Business and Professions Code section 17200. It alleged, among other things, that U.S. Bank had "demanded payment of, and added into the amounts demanded before and after the declaration of default and foreclosure, illegal penalties under the guise of a 'prepayment fee,' 'late charges,' and 'default interest' . . . ."

The breach of contract cause of action alleged U.S. Bank breached the loan documents in various ways, including by

declaring defaults without basis, demanding payment of late fees and default interest, refusing to allow withdrawal of funds from reserve accounts after receiving such payments under protest, demanding illegal and unreasonable penalties and fees, and recording a Notice of Sale that featured a loan balance overstated by certain amounts, including the assertedly improper $14 million prepayment fee.

The wrongful foreclosure cause of action alleged defendants had recorded a notice of sale that "included an illegal, fraudulent willfully oppressive prepayment penalty, in the sum of $14,007,811.30, even though no actual payment had occurred[,]" as well as "inflated estimated costs, expenses and advances, illegal interest, illegal default interest penalties and late payment penalties and improper legal fees . . . and more than $840,000 in principal that had already been paid according to [U.S. Bank's] own records." It further alleged the "overstatement prejudiced Plaintiffs in that it prevented Plaintiffs from attempting to cure the default within 5 days of the sale, which Plaintiffs could have accomplished, chilled bidders from attending the Trustee's Sale and from overbidding [U.S. Bank's] credit bid thereby offering fair and reasonable amounts to maximize the value obtained for the Property, and improperly allowing [U.S. Bank] to credit bid in excess of the actual amount of the debt."[3]

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[3] The facts alleged in connection with the unjust enrichment and Business and Professions Code section 17200 causes of action were no broader than the facts alleged to support the breach of contract and wrongful foreclosure claims.

2. Defendants' motion for summary adjudication

Defendants moved for summary judgment or summary adjudication of the claims in the operative complaint. Defendants argued they were entitled to summary adjudication of the breach of contract cause of action because (1) the prepayment fee was not an illegal penalty; (2) the notice of default neither included nor was required to include the prepayment fee; (3) the notice of trustee's sale properly included the prepayment fee; and (4) in any event, there was no substantial evidence plaintiffs suffered damages as a result of defendants' inclusion of the prepayment fee in the Notice of Sale. Defendants argued they were entitled to summary adjudication of the wrongful foreclosure cause of action for the last of these reasons, i.e., because plaintiffs could not demonstrate they had been prejudiced by the inclusion of the prepayment fee, late charges, and default interest in the Notice of Sale. And defendants argued summary adjudication of the remaining claims for unjust enrichment and violation of Business and Professions Code section 17200 was likewise warranted—for the former because an unjust enrichment claim does not lie where express contracts define the parties' rights, and for the latter because an unfair competition claim is derivative of other violations of law and all the other causes of action were meritless.

The trial court denied the motion for summary judgment but granted summary adjudication of the wrongful foreclosure, unjust enrichment, and Business and Professions Code section 17200 causes of action in defendants' favor (summary adjudication of the breach of contract claim was denied). In summarily adjudicating the wrongful foreclosure cause of action, the trial court found that even if the $14 million-plus prepayment

fee included in the Notice of Sale was "completely erroneous," defendants' summary adjudication evidence demonstrated plaintiffs suffered no prejudice from the inclusion of the fee. Specifically, the court found the amount of indebtedness stated in the Notice of Sale was not the amount needed to cure the asserted default (but rather to redeem the property before the trustee's sale); plaintiffs' operative complaint alleged only that they were wrongfully deprived of the opportunity to cure the asserted default (not that they would have redeemed the Property); and thus, plaintiffs had not even alleged prejudice from inclusion of the prepayment fee in the Notice of Sale.[4] The trial court rejected plaintiffs' argument that inclusion of the prepayment fee in the indebtedness amount listed in the Notice of Sale prejudiced plaintiffs by scaring off potential bidders from participating in the trustee's sale (which, plaintiffs believed, could have resulted in a higher sale price). The court found plaintiffs had cited no evidence that would contradict an admission by plaintiffs' managing member that he was unaware of any specific facts to support the claim that inclusion of the prepayment fee chilled bidding at the trustee's sale.

As for the remaining causes of action alleged in the operative complaint, the court summarily adjudicated the unjust enrichment cause of action in defendant's favor, citing case law

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[4] The trial court further concluded plaintiffs had put forward no evidence that they would have cured the asserted default had it not been for the inclusion of other assertedly improper penalties and interest charges in the Notice of Default amount. Rather, the court found, "[p]laintiffs' evidence is that they **did** have access to sufficient funds to pay the $6+ million set forth in the Notice of Default."

holding there is no cause of action for unjust enrichment in California because it is a general principle underlying various legal doctrines rather than being a remedy itself. The court also summarily adjudicated the Business and Professions Code section 17200 claim in defendants' favor because it was predicated on the same wrongful foreclosure theory the court had already found deficient.

3. The bifurcated trial on the prepayment fee

With the breach of contract claim still viable following the trial court's summary judgment ruling, defendants moved to bifurcate and try first the operative complaint's allegations that the prepayment fee, default interest rate, and late charges imposed by defendants were unenforceable penalty provisions. The trial court agreed. U.S. Bank also filed a motion in limine seeking to prevent plaintiffs from presenting an expert on the trade usage of the term "prepayment." The trial court granted this motion as well, reasoning its task was to interpret the Note and the Note did not appear ambiguous.

During the court trial, the parties narrowed the issues by stipulating the default interest rate and late fee provisions in the Note were enforceable and the only issue for the court's decision was whether the prepayment fee was enforceable. U.S. Bank made a motion for judgment pursuant to Code of Civil Procedure section 631.8. The trial court granted the motion for judgment and later issued a statement of decision finding the prepayment fee was not an illegal penalty provision.

In its statement of decision, the trial court rejected plaintiffs' argument that the prepayment fee applies only in the event that the borrower makes a voluntary cash prepayment of

the Note and not in case of an involuntary foreclosure because "the rationale for imposition of the prepayment penalty applies in either event, foreclosure or early payoff, because under both scenarios, the Trust has lost the bargained for income which would be paid over the life of the loan." The trial court noted Civil Code section 1671 (the statute governing validity of contractual liquidated damages provisions) presumes the prepayment fee is valid and places the burden on plaintiffs to show it was unreasonable under the circumstances existing at the time the contract was made, which the court believed plaintiffs had not done.

The trial court also considered the proper calculation of the prepayment fee. It discussed this court's opinions in *Yashouafar* and *Figueroa Tower I* and noted they "made clear that the prepayment penalty may not be calculated as of the issuance of the Notice of Default/Acceleration Letter." Looking to section 3(b) of the Note and sections 12.4 and 15.1 of the Deed of Trust, the court concluded "[i]n reconciling these provisions, it becomes clear that: 1) a prepayment fee is to be imposed regardless of whether there is an early payoff or an event of default which is followed by an early payoff as a result of a bid made at a trustee's sale; and 2) the prepayment fee, while not to be included with the Notice of Default/Acceleration Letter, is to be retroactively calculated to the date of default using the formula set forth in Sections 12.4(c) and 12.4(d) of the Deed of Trust, namely June 24, 2011 and included in the Notice of Trustee's Sale so that when the bids are made, the beneficiary is in a position to obtain the bargained[-]for consideration."

4. The court holds another separate trial on plaintiffs' standing to pursue the breach of contract cause of action

Following the first bifurcated-issue bench trial, defendants filed a motion to sever and present nine additional issues for the court's consideration before the breach of contract claim was set for a jury trial. Among these was the issue of whether "[p]laintiffs have standing to continue the prosecution of their Breach of Written Contract Cause of Action against the Trust as a result of the Commercial Code Sale [of general intangibles] conducted by the Trust on December 11, 2013." The trial court granted the motion as to that issue only.

Prior to this second court trial, the parties agreed to a factual stipulation. According to its terms, and solely for the purpose of the severed trial "and without prejudice to, or waiver of, any of Plaintiffs' rights . . . regarding any appeal filed in this case," the parties stipulated the unpaid balance of the Note due and owing to the Trust after the credit bid of $67 million was at least $35,000, and that plaintiffs' failure to pay the prepayment fee and/or the $35,000 was an event of default under the Note and Deed of Trust.

Two witnesses testified at trial. Nicholas De Lancie, an attorney representing U.S. Bank, testified regarding the foreclosure sales. De Lancie explained there were three foreclosure sales related to the Property, the real property foreclosure sale in January 2013, the collateral disposition sale under the Uniform Commercial Code in December 2013, and another collateral disposition sale. De Lancie prepared and signed the notification of disposition of collateral for the December 2013 sale, which was served on plaintiffs. He also

prepared an advertisement for the sale, which ran in the Los Angeles Times and stated, among other things, that "general intangibles" would be included in the sale (the claims asserted in plaintiffs' lawsuit were not specifically identified). De Lancie was the successful bidder—and the only bidder—at the December 2013 collateral sale, purchasing the general intangibles for a credit bid of $10,000.

Simon Barlava, a member of defendant Figueroa II, LLC, was the other witness to testify. He understood that the Note was secured by collateral, that the Property was the collateral, and that intangibles related to the real property were included in the security. He testified he did not understand, however, that when he received notice of the December 2013 collateral sale that the causes of action asserted in the lawsuit pending between plaintiffs and defendants were among the general intangibles to be sold. Barlava agreed he took no action in response to the notice but he asserted he would have taken steps to prevent the collateral sale from going forward had he known the claims asserted in this action were among the general intangibles being sold.

The trial court took the matter under submission and later issued a statement of decision concluding plaintiffs had no standing to pursue the breach of contract cause of action in light of the general intangibles collateral sale. The court relied on the Commercial Code's definition of "general intangibles," which includes "things in action," i.e., rights to recover money or other personal property by way of a judicial proceeding. The court further reasoned that a security interest may exist in collateral acquired by a borrower after undertaking a loan obligation and that a security interest arising by virtue of an after-acquired

claim is no less valid than one to which the debtor has rights at the time value is first given. And the court concluded the parties' stipulation established two "Events of Default" had occurred under the Note and Deed of Trust, which authorized defendants to proceed with the Commercial Code sale of general intangibles.

The trial court expressly rejected plaintiffs' reasons for arguing the contrary. In response to plaintiffs' argument that inclusion of the lawsuit would run afoul of Civil Code section 1668,[5] the trial court noted the statute does not apply in the context of a commercial transaction but only to cases that involve "'the public interest.'" In response to plaintiffs' argument that U.S. Bank should be barred from asserting its lack of standing defense because it was not asserted in prior demurrers or motions for summary judgment, the court found U.S. Bank had preserved its right to assert the defense by asserting it as an affirmative defense in its answer to the operative complaint. And in response to plaintiffs' argument that the Commercial Code barred U.S. Bank from taking the general intangibles if it had acted in bad faith, the trial court concluded plaintiffs had provided no evidence to establish U.S. Bank acted in bad faith and U.S. Bank had satisfied its burden of proof that it advertised and conducted the sale in a commercially reasonable manner.

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[5] Civil Code section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

The trial court subsequently entered judgment for defendants. It also granted U.S. Bank's motion for attorneys' fees as authorized by provisions in the Deed of Trust.

II. DISCUSSION

On appeal, plaintiffs challenge (1) the trial court's summary adjudication order, including the ruling that plaintiffs were not prejudiced by inclusion of the $14 million prepayment fee in the amount listed on the Notice of Sale; (2) the trial court's conclusion, after the first bifurcated-issues trial concerning the breach of contract claim, that the prepayment fee was not an impermissible contractual penalty; and (3) the trial court's conclusion, after the second bifurcated-issues trial, that plaintiffs had no standing to bring the breach of contract claim. The conclusions we reach as to the first and third of these issues obviate any need to resolve the second.[6] That is to say, we hold the evidence is undisputed on the summary judgment record that plaintiffs were not prejudiced by inclusion of the challenged prepayment fee in the Notice of Sale, and thus, the trial court correctly adjudicated this issue summarily in defendants' favor. We further hold the trial court correctly found plaintiffs—sophisticated commercial parties—lack standing to prosecute their breach of contract cause of action because, in the Deed of Trust (which functioned as a trust deed and security agreement), they pledged their current and future general intangibles as security. Those general intangibles, purchased by U.S. Bank at

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[6] We accordingly deny defendants' request for judicial notice, which seeks notice of documents relevant only to that second issue.

the December 2013 collateral sale, included the rights to the breach of contract claim. These twin holdings doom the entirety of plaintiffs' operative complaint as framed for our decision and we shall therefore affirm the judgment.

A. The Trial Court's Summary Adjudication Order Was Proper

Plaintiffs argue the trial court erred in granting defendants' motion for summary adjudication. Plaintiffs claim there was evidence they were injured by inclusion of the prepayment fee in the Notice of Sale because (1) plaintiffs could have cured the default and avoided the foreclosure but for the inclusion of the prepayment fee and (2) the inclusion of the prepayment fee in the notice chilled other potential bidders from participating in the foreclosure sale. Even assuming the $14 million prepayment fee was incorrectly included in the amount of indebtedness stated in the Notice of Sale, plaintiffs failed to present evidence that would permit a conclusion they were prejudiced by the inclusion and the trial court properly granted defendants' motion for summary adjudication of the claim.

1. Standard of review and elements

"In reviewing an order granting summary adjudication, 'we apply the same standard of review applicable on appeal from a grant of summary judgment. [Citation.]'" (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 950.) Where a "'case comes before us after the trial court granted a motion for summary [adjudication], we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "'We review the trial court's decision de novo, considering all the

evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary [adjudication] and resolve doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]" (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.)

2. Plaintiffs adduced no evidence on which a jury could find their ability to cure the noticed default was prejudiced

"During the foreclosure process, the debtor/trustor is given several opportunities to cure the default and avoid the loss of the property. First, the trustor is entitled to a period of reinstatement to make the back payments and reinstate the terms of the loan. [Citation.] This period of reinstatement continues until five business days prior to the date of the sale, including any postponement. [Citation.] In addition to the right of reinstatement, the trustor also possesses an equity of redemption, which permits the trustor to pay all sums due prior to the sale of the property at foreclosure and thus avoid the sale. [Citations.]" (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830-831.)

In order to reinstate the loan, plaintiffs would have needed to tender "the entire amount due, at the time payment is tendered, with respect to (A) all amounts of principal, interest, taxes, assessments, insurance premiums, or advances actually known by the beneficiary to be, and that are, in default *and shown in the notice of default*, under the terms of the deed of trust or mortgage and the obligation secured thereby, (B) all amounts in default on recurring obligations not shown in the

notice of default, and (C) all reasonable costs and expenses . . . other than the portion of principal as would not then be due had no default occurred." (Civ. Code, § 2924c, subd. (a)(1), italics added.) Such tender would have "cure[d] the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if the acceleration had not occurred." (Civ. Code, § 2924c, subd. (a)(1).)

Plaintiffs did not present any evidence demonstrating their ability to cure the default was affected by the inclusion of the $14 million prepayment fee in the Notice of Sale. The Notice of Default stated the amount due to reinstate the loan was $6,547,954 as of May 2012, and it was the Notice of Default, not the Notice of Sale, that controlled the amount plaintiffs would have needed to tender in order to reinstate the loan and cure the default. (Civ. Code, § 2924c, subd. (a)(1).) Because the $14 million prepayment fee was not included in the amount in arrears stated in the Notice of Default, plaintiffs' ability to cure that default and reinstate the loan could not have been prejudiced.

In fact, plaintiffs' own summary judgment evidence, namely Barlava's declaration stating he "had the financial access to utilize, at a minimum, the sum of $10 million to advance to Plaintiffs to pay the Trust to cure the actual amounts due under the Notice of Default" during the relevant time period indicates plaintiffs had access to sufficient funds to cure their default. Defendants produced evidence that plaintiffs did not attempt to use any such funds to cure the default, and plaintiffs did not

present any evidence that would require resolution of the issue by a jury.[7]

Plaintiffs protest, however, that U.S. Bank prevented them from curing the default by insisting they had to pay the prepayment fee during bankruptcy proceedings, and later, as a condition of halting the foreclosure. The portions of the record to which they refer, however, only indicate U.S. Bank asserted it was owed the prepayment fee in the Bankruptcy proceedings. They do not demonstrate U.S. Bank demanded the prepayment fee as part of the payment necessary to cure the default and reinstate the loan. Nor could U.S. Bank have done so. A debtor exercising his or her statutory right to reinstatement is "only required to pay the delinquent sums, including recurring obligations, and is not required to pay portions of principal that but for the acceleration would not have been due prior to the date of reinstatement." (5 Miller & Starr, Cal. Real Est. (4th ed. 2016) Deeds of Trust and Mortgages, § 13:230; see also Civ. Code, § 2924c, subd. (a)(1).)

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[7] To the extent plaintiffs argue the inclusion of the prepayment fee prevented them from redeeming the entire loan outright, the argument fails because the record evidence indicates that if Barlava could have accessed all of the funds potentially at his disposal, he would have been able to pay around $35 million. That would not have even satisfied the $61 million in principal due on the loan.

3. Plaintiffs failed to create a triable issue of material fact that foreclosure auction bidding was chilled to their detriment

Plaintiffs additionally argue they were injured by the inclusion of the prepayment fee in the notice of trustee's sale because it chilled bidders from attending the sale and left U.S. Bank free to prevail with a $67 million credit bid (rather than a higher sale amount that might have resulted from competitive bidding). To create a triable issue of material fact as to prejudice, however, plaintiffs needed to provide evidence of "a ready, willing and able buyer who would have paid the higher price but for the wrongful conduct. Otherwise, [the] damages alleged would be speculative." (*FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1023 (*FPCI RE-HAB*); see also *Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1426 [upholding summary judgment where plaintiff failed to show existence of prospective buyer who was ready, willing, and able to purchase property at trustee's sale].)[8]

Plaintiffs presented no evidence indicating there was a ready, willing, and able bidder who would have bid on the

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[8] Plaintiffs argue *FCPI RE-HAB* is distinguishable because "there never should have been a foreclosure sale in the first place," contending that if U.S. Bank had permitted plaintiffs to cure, there would have been no foreclosure. But plaintiffs have presented no evidence U.S. Bank rejected tender of the amount necessary to reinstate the loan or otherwise prevented them from tendering that amount. Plaintiffs' citation to *In re Worcester* (9th Cir. 1987) 811 F.2d 1224, 1229, which addresses whether a debtor is prejudiced when property is inaccurately described in a notice of trustee's sale, is factually inapposite.

Property but for the inclusion of the prepayment fee, and defendants adduced discovery responses and deposition testimony demonstrating plaintiffs lack such evidence. Specifically, plaintiffs' responses to certain discovery requests, including responses to a special interrogatory asking plaintiffs to state all facts supporting their contention the prepayment fee chilled bidding at the foreclosure sale, failed to identify any prospective bidders. Similarly, the deposition testimony of Massoud Yashouafar, one of the guarantors on the loan, revealed Yashouafar did not know of any third parties who had attended the trustee's sale and did not know of any specific facts to support plaintiffs' claims that the inclusion of the prepayment fee chilled bidding. Plaintiffs' own proffered material facts stated there were no bidders at the foreclosure sale, and no bidders had registered with the foreclosing trustee. In short, plaintiffs did not provide evidence of any other bidders who would have been interested in the Property but for the Notice of Sale debt amount, much less any who would have been willing and able to bid a sufficient sum.

Plaintiffs' argument to the contrary relies merely on speculation. Plaintiffs argue Yashouafar's deposition testimony that "[o]bviously, when the notice of sale has a demand amount in there, which is at the time higher than the market value of the property, people will not line up to write you a cashier check to pay for a property at full price or above market price to buy a property at foreclosure sale" demonstrated potential bidders were chilled. This is not evidence of a ready, willing, and able bidder who would have purchased the property but for the prepayment fee. Plaintiffs also argue the fact that U.S. Bank later sold the Property to a third party for $80 million indicates there would

have been other bidders if the sale price announced in the notice of trustee's sale had been lower. This, too, is speculative. The trustee's sale was held in January 2013. U.S. Bank did not sell the Property to a third party until May 2014. That a third party purchased the property more than a year after the trustee's sale, and with the ability to negotiate terms that do not apply in a foreclosure auction, does not indicate the same third party would have bid at the foreclosure sale in January 2013 but for the prepayment fee.

B. The Trial Court Correctly Concluded Plaintiffs Lacked Standing to Pursue Their Breach of Contract Claim

Plaintiffs challenge the procedural juncture at which U.S. Bank raised the standing argument, argue the breach of contract cause of action was not a "general intangible" included in the security agreement, and contend the second collateral sale is void because it was not commercially reasonable. We find none of these arguments persuasive and conclude the trial court did not err in concluding plaintiffs lack standing to assert the breach of contract cause of action.

1. Plaintiffs' preliminary procedural arguments

Plaintiffs argue U.S. Bank forfeited any challenge to their standing by raising the issue late in the litigation. Plaintiffs further contend defendant's reliance on their standing affirmative defense is barred by the law of the case doctrine. Both contentions lack merit.

Defendants have not forfeited their standing argument. "'"[A] complaint by a party lacking standing fails to state a cause

of action by the particular named plaintiff, inasmuch as the claim belongs to somebody else. [Citation.]"" (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501 (*Cummings*).) A plaintiff's lack of standing to sue on a claim is a jurisdictional defect that is not waived by a defendant's failure to raise it by demurrer or answer and can be raised at any time in a proceeding, including for the first time on appeal. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438; *Cummings*, *supra*, at p. 501; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 2:78, p. 2-34.) Based on these principles, the issue of standing could not have been forfeited by U.S. Bank's purported delay in raising it. Plaintiffs' delay argument is also factually unpersuasive since U.S. Bank first asserted lack of standing as an affirmative defense in its Answer to the First Amended Complaint in December 2013.

Nor does the law of the case doctrine preclude U.S. Bank from asserting plaintiffs lack standing. "'The law of the case doctrine states that when, in deciding an appeal, an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal."' [Citation.]" (*Quackenbush v. Superior Court* (2000) 79 Cal.App.4th 867, 874.) "Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in a prior appeal. [Citation.] This general rule, however, is subject to an important exception. The doctrine is held applicable to questions not expressly decided but implicitly decided because they were essential to the decision on the prior appeal." (*Ellison v. Ventura Port District* (1978) 80 Cal.App.3d

574, 579.) Although no party raised the issue of standing in *Figueroa Tower I*, plaintiffs argue this court's disposition of that appeal necessarily decided—implicitly— that plaintiffs do have standing and plaintiffs contend that silent but implicit determination is binding law of the case.

Even assuming our prior opinion made such an implicit finding, the facts presented to the court at the second bifurcated-issues bench trial are materially different from those before this court in the prior appeal. The law of the case doctrine "only applies when, upon a subsequent trial, the issues and facts found remain substantially the same, and has no application where the facts alleged and found are materially different from those considered on a former appeal." (*Weightman v. Hadley* (1956) 138 Cal.App.2d 831, 841.) Further, it "not only does not apply to new and additional evidence, it does not apply when explanation of previous evidence appears in the later trial." (*Ibid.*) The law of the case doctrine therefore does not bar defendants from maintaining plaintiffs had no standing to prosecute a breach of contract claim following the December 2013 collateral sale, and the cases upon which plaintiffs rely to argue the contrary are unavailing—none involve a subsequent trial involving new and additional evidence after remand. (See, e.g., *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799, 804 [matter submitted and decided upon the record of the first trial]; *Lindsey v. Meyer* (1981) 125 Cal.App.3d 536, 542 [no new trial upon remand].)

2. Standard of review

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de

novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).)

3. Plaintiffs' breach of contract cause of action was collateral included in the commercial sale

To determine whether plaintiffs lack standing to pursue their breach of contract claim, we must first determine whether the breach of contract claim was part of the collateral sold to U.S. Bank. U.S. Bank purchased "[a]ll interests of any Debtor in any of the intangible and tangible personal property described on Exhibit B," including plaintiffs' general intangibles, at the second collateral sale. The question, then, is whether the breach of contract claim was among the personal property pledged as collateral. Our analysis begins with the security documents.

Pursuant to its terms, the Deed of Trust also functions as a security agreement for personal property pledged as collateral. Pursuant to the Deed of Trust, plaintiffs "irrevocably mortgage[d], grant[ed], bargain[ed], s[old], convey[ed], transfer[red], pledge[ed], act[ed] over and assign[ed] to [U.S. Bank], WITH POWER OF SALE, and create[d] a security interest in, all of [plaintiffs'] estate, right, title and interest in, to and under any and all of the following described property, whether now owned or hereafter acquired by [plaintiffs]," including "[a]ll present and future . . . general intangibles (including, without limitation, trademarks, trade names, service

marks and symbols . . . , all names by which the Premises or the Improvements may be operated or known, all rights to carry on business under such names, and all rights, interest and privileges which [plaintiffs] ha[ve] or may have as developer or declarant under any covenants, restrictions or declarations now or hereafter relating to the Premises or the Improvements) (collectively, the 'General Intangibles') . . . ."

Article 13 of the Deed of Trust reinforces the same point, stating the "Deed of Trust is also intended to encumber and create a security interest in, and [Figueroa Tower] hereby grants to [U.S. Bank] a security interest in . . . all . . . general intangibles and other personal property included within the Trust Property . . . whether or not the same shall be attached to the Premises or the Improvements in any manner." It further provides the "Deed of Trust constitutes a security agreement" and that U.S. Bank "shall have all of the rights and remedies of a secured party under any applicable Uniform Commercial Code."

The Deed of Trust does not separately define "general intangibles." This does not, however, mean the term lacks a definition. Because the Deed of Trust is, in part, a security agreement, it is governed by Division 9 of the California Uniform Commercial Code. (Cal. U. Com. Code, § 9109, subd. (a)(1)[9] [except as otherwise provided, Division 9 applies to "[a] transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract"]; see also § 9109, subd. (d)(11)(D).) Section 9102, subdivision (a)(42) defines "'[g]eneral intangible' . . . [as] any personal property, including

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[9] Undesignated statutory references that follow are to the California Uniform Commercial Code.

things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software."

Under California law, a thing in action is "a right to recover money or other personal property by a judicial proceeding" (Civ. Code, § 953; see also *Baum v. Duckor* (1999) 72 Cal.App.4th 54, 64), including "'a right of action for . . . breach of contract [citation] . . . '" (*Bisno v. Kahn* (2014) 225 Cal.App.4th 1087, 1104). Thus, plaintiffs' breach of contract cause of action was a "thing in action" that fell within the category of "general intangibles" plaintiffs pledged as collateral for the loan.

It is immaterial that plaintiffs' breach of contract cause of action did not yet exist when the Deed of Trust was signed. "[A] security agreement may create or provide for a security interest in after-acquired collateral." (§ 9204, subd. (a); see also *Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517, 528-529.) While commercial tort claims are excluded from this rule, contract actions are not. (See § 9204, subd. (b)(2).) The Deed of Trust "create[d] a security interest in, all of [plaintiffs'] estate, right, title and interest in, to and under any and all of the following described property, whether now owned or hereafter acquired," including "[a]ll present and future . . . general intangibles." Thus, by its terms and the terms of relevant statutes, the pledged collateral encompassed "things in action," including plaintiffs' breach of contract cause of action acquired after the execution of the Deed of Trust.

Plaintiffs, however, argue the *ejusdem generis* canon (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th

924, 939 [when specific words follow general words, the general words ordinarily are best construed in a manner that underscores their similarity to the specific words]) limits the "general intangibles" pledged as collateral to items directly related to the Property's premises and improvements, and excludes the breach of contract cause of action. That principle of statutory interpretation has no application here. None of the personal property listed alongside the "general intangibles" (namely the funds, accounts, instruments, accounts receivable, documents, or, notably, claims) are necessarily limited to the premises or its improvements. Nor do the terms in the parenthetical following "general intangibles" serve to limit its scope. The specification of certain items, such as trademarks and trade names, as general intangibles does not alter or negate the definition of the term, which is provided by the Uniform Commercial Code. This is particularly true since the parenthetical includes explicit non-limiting language: "without limitation."

In addition, plaintiffs oppose a broad reading of the term "general intangibles" on the ground that the security interest could not reasonably be interpreted to encompass intangibles not related to the Property. This argument fails on two fronts. First, if the parties had wished to limit the scope of the general intangibles pledged, they could have done so. Other collateral pledged in the Deed of Trust was so limited, such as the "insurance policies or binders now or hereafter relating to the Trust Property." Second, and more fundamentally, plaintiffs' cause of action for breach of the Note and Deed of Trust *is* inherently related to the Property.

Plaintiffs also argue U.S. Bank could not have believed it purchased plaintiffs' cause of action because it delayed in

asserting the standing defense until "nearly four years into the litigation." The argument is both factually inaccurate and logically untenable. U.S. Bank asserted plaintiffs' lack of standing as an affirmative defense at least as early as 2013, and provided further detail regarding lack of standing in response to discovery requests in 2016.

Plaintiffs additionally advance a further smattering of unpersuasive arguments. Plaintiffs continue to rely on Civil Code section 1668 to argue U.S. Bank's interpretation of the security agreement and sale would violate public policy. (Civ. Code, § 1668 ["All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law"].) But Civil Code section 1668 applies only when the public interest in implicated, and the statute generally does not prohibit parties from limiting liability for breach of contract. (See, e.g., *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126 ["With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy"].) Plaintiffs did not allege or argue unconscionability, and there is no indication this commercial contract dispute implicates the public interest. Plaintiffs argue the breach of contract cause of action cannot be included in the general intangibles because doing so would violate the maxim that one cannot be both a plaintiff and defendant. The 1850's authority upon which plaintiffs rely, *Bullard v. Kinney* (1858) 10 Cal. 60, 63 (*Bullard*), notes this ground is a "technical" one that "may be considered as

not so material under our system of pleading"; moreover, *Bullard* did not involve a situation where a defendant purchased the general intangibles of a plaintiff, including the pending cause of action, after the plaintiff commenced the lawsuit. Finally, plaintiffs argue their breach of contract cause of action could not have been included in the collateral because section 9109, subdivision (d)(6) precludes "[a]n assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract." Plaintiffs misread the statute, which merely provides that such transactions are not covered by Division 9 of the Uniform Commercial Code. (See § 9109, subd. (d)(6).) Moreover, the argument is inapposite because plaintiffs did not assign a right to payment to U.S. Bank. Plaintiffs pledged general intangibles as security for their loan, and U.S. Bank ultimately purchased those general intangibles.

4. The reasonableness of the collateral sale

In addition to challenging the trial court's conclusion that the pending breach of contract claim was one of the general intangibles pledged as security for the loan—and thus one of the general intangibles sold at the second collateral sale—plaintiffs argue the sale was invalid because it was not commercially reasonable.

Section 9610, subdivision (a) governs the disposition of personal property collateral after a default. It provides that "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." (§ 9610, subd. (a).) "Every aspect of a disposition of collateral, including the method, manner, time, place, and

other terms, must be commercially reasonable." (§ 9610, subd. (b).) A secured party is permitted to purchase collateral at a public disposition, and at a private disposition under certain circumstances. (§ 9610, subd. (c).)

Plaintiffs argue the sale was invalid because it was not commercially reasonable. Section 9625 provides the "basic remedies afforded to those aggrieved by a secured party's failure to comply" with Division 9. (Comment No. 2 to § 9625.) Pursuant to section 9625, if a secured party does not conduct a commercially reasonable sale, "a court may order or restrain collection, enforcement, or disposition of collateral." (§ 9625, subd. (a).) That secured party may also be "liable for damages in the amount of any loss caused by a failure to comply with [Division 9]," and the debtor may recover damages. (§ 9625, subds. (b)-(c).) None of the provided remedies, however, permit plaintiffs to have the sale declared void and unwound.

Because U.S. Bank was both the secured party and the transferee in this instance, remedies against a transferee are also relevant. The Uniform Commercial Code provides "[a] transferee that acts in good faith takes free of the rights and interests described in subdivision (a) [the debtor's rights, the security interest under which the disposition is made, and any subordinate security interest or lien], even if the secured party fails to comply with [Division 9] or the requirements of any judicial proceeding." (§ 9617, subd. (b).) "If a transferee does not take free of the rights and interests described in subdivision (a), the transferee takes the collateral subject to all of the following: [¶] (1) The debtor's rights in the collateral[;] [¶] (2) The security interest or agricultural lien under which the disposition is made [; and] [¶] (3) Any other security interest or other lien." (§ 9617,

subd. (c).) Section 9617 thus provides that so long as the secured party acts in good faith and conducts a commercially reasonable sale, the transferee takes the purchased property free of other interests.

"A disposition of collateral is made in a commercially reasonable manner if the disposition satisfies any of the following conditions: [¶] (1) It is made in the usual manner in a recognized market[,] [¶] (2) It is made at the price current in any recognized market at the time of disposition[, or] [¶] (3) It is made otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." (§ 9627, subd. (b); see also *Hutchison v. Southern California First Nat. Bank* (1972) 27 Cal.App.3d 572, 583.) "However, none of the specific methods of disposition specified in subsection (b) is required or exclusive[,]" and other methods may be commercially reasonable. (Comment No. 3 to § 9627; see also 11 Anderson, Uniform Commercial Code, § 9-627:5 (3d ed.1999).) Whether a disposition is commercially reasonable is generally an "intensively factual" question that depends on all of the circumstances existing at the time of the sale. (*Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 Cal.4th 1220, 1235; see also *Aspen Enterprises, Inc. v. Bodge* (1995) 37 Cal.App.4th 1811, 1827; *Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 862.)

The trial court found U.S. Bank had demonstrated it "conducted the sale in a commercially reasonable manner by giving notice, advertising the sale, and conducting the sale appropriately." We review the trial court's findings of fact for substantial evidence (*Thompson*, *supra*, 6 Cal.App.5th at p. 981) and conclude the requisite evidence is present. The record

indicates U.S. Bank gave plaintiffs notice of the sale, a fact plaintiffs have not disputed, and U.S. Bank ran an advertisement for the sale in the Los Angeles Times on two separate dates. While plaintiffs argue the advertising was insufficient because it did not specifically identify this lawsuit as one of the general intangibles being sold, a description of collateral reasonably identifies the collateral if it identifies the collateral by category. (§ 9108, subd. (b)(2).) The advertisement's identification of "general intangibles," specifically in light of its reference to the definitions in the Uniform Commercial Code, was sufficient.

Plaintiffs additionally argue the sale could not have been commercially reasonable because U.S. Bank failed to ensure a higher realization and conduct a sale to the "highest bidder." This argument too fails because "[t]he fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner." (§ 9627, subd. (a).)

Finally, plaintiffs appear to assert the sale was invalid because they demonstrated their actual remaining debt was less than the amount of U.S. Bank's credit bid at the real property foreclosure sale. However, for the purposes of this trial plaintiffs stipulated they owed at least $35,000 after the real property foreclosure and asked the trial court to use that fact to reach a conclusion on the merits. In a footnote on reply, plaintiffs argue they reserved their right to challenge the stipulation on appeal. Putting aside that any rights plaintiffs reserved are so vague as to be unidentifiable, plaintiffs cannot stipulate to a key fact

below, induce the trial court to rely upon the stipulated fact, and then say the trial court erred by doing so. Plaintiffs are bound by the facts to which they stipulated.

5. The validity of the Uniform Commercial Code sale is not dependent on the validity of the real property foreclosure

Plaintiffs argue that if the real property foreclosure was invalid, so was the sale of the personal property. Plaintiffs misunderstand the applicable law. Where an obligation secured by a security interest in personal property is also secured by an interest in real property, a secured party may enforce the real property security under real property law, enforce the security interest on personal property or fixtures under the Uniform Commercial Code, or conduct a unified sale of the real property and some or all of the personal property. (§ 9604, subd. (a)(1).) The propriety of the real property foreclosure is thus irrelevant to the personal property foreclosure. If plaintiffs defaulted and U.S. Bank was entitled to foreclose, it was entitled to foreclose on the real and personal property in any order it desired.

DISPOSITION

The judgment is affirmed. U.S. Bank shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.